United States
Circuit Court of Appeals
For the Ninth Circuit.

J. V. Spaugh and Harry M. Curry,
Appellants,

vs.

United States of America,
Appellee.

BRIEF AND ARGUMENT OF APPELLANT HARRY M. CURRY.

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OPENING STATEMENT.

On November 29th, 1933, appellants Harry M. Curry and J. V. Spaugh were indicted by the Grand Jury for the Southern District of California for the crime of conspiring (with themselves and others) to forge and counterfeit, and causing to be forged and counterfeited, Government Liberty Bonds. This was cause No. 11752-H. Both appellants were convicted, and appellant Curry was sentenced to a term of two years imprisonment and to pay a fine of one thousand dollars. Appellant Spaugh was likewise sentenced to imprisonment and fine; but as separate briefs are written in this appeal, we will herein refer to Spaugh only insofar as it is necessary for clarity.

On the same date as above, November 29th, 1933, appellant Curry was indicted with others not here appealing in causes No. 11755 and 11757. These indictments charged the defendants with substantive counts of forging and aiding and abetting in the forging of Government Liberty Bonds. In cause No. 11755 the defendant Curry was acquitted of all counts. In cause No. 11757 he was convicted of all five counts and sentenced to serve two years in prison upon each count, the sentences to run concurrently upon each count and concurrently with the sentence pronounced in the indictment No. 11752 charging him with conspiracy.

From the judgments pronounced upon him from these convictions he prosecutes this appeal.

I.

The Court Erred in Its Inquiry of the Jury Prior to Its Reaching a Verdict as to Appellants, as to How the Jury Stood Numerically.

This is the sole point on appeal raised by defendant Curry.

The evidence, except such portions thereof as are reviewed by the trial court in its comments on the facts to the jury during the instructions, is not contained in the bill of exceptions, appellant Curry conceding that if the jury believed the evidence before it, such evidence was sufficient on which to base a verdict of guilt.

It is, however, significant that the following facts appear from the record in this cause:

The trial occupied almost three weeks. [Tr. of Record, p. 100, paragraph 2.]

On January 27th, 1934, at 11:10 a. m. the court proceeded to give its instructions to the jury [Tr. p. 64] and on said date, at the hour of 1:43 p. m., the jury retired to deliberate upon its verdict. [Tr. p. 113, line 3.]

After the jury had been deliberating forty-six hours it was recalled by the court and through its foreman reported that it had not reached a verdict in all cases. [Tr. pp. 113-114.]

It must be remembered that there were a number of other indictments, in which the appellant Curry was not named as a defendant, but which were consolidated for trial with the indictments in which he was named as a defendant.

We now find that on this occasion when the court addressed the jury, after it had been deliberating for forty-six hours, that the court inquired of the foreman of the jury whether they had finished balloting in case No. 11,668 and the jury informed the court that they were through balloting on that case. This was the case in which the appellant Curry was not named as a defendant.

The court then inquired as to case No. 11,751, and the jury informed it that they had finished balloting on that case. This also was a case in which the appellant Curry was not named as a defendant.

The next inquiry [Tr. p. 115] was concerning case No. 11,752, in which the appellants were named as defendants, and the foreman informed the court they had not finished balloting on that case.

The court then inquired as to case No. 11,755, in which the appellant Curry was named as defendant, and

the foreman informed the court they had not finished balloting on that case.

The court then inquired as to case No. 11,756, a case in which the appellant Curry was not named as a defendant, and the jury informed him they had finished balloting upon that case.

The court next inquired as to case No. 11,757, in which the appellant Curry was defendant, and was informed by the foreman that they had not finished balloting upon that case.

By reference to the verdicts in those cases upon which the jury reported at that time that they had finished balloting, it will be found that in all of those cases verdicts of guilty had already been reached.

The court then gave the instruction found upon pp. 116-117 of the Record, the following portion of which was excepted to by the appellants:

> "And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should likewise consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath."

After giving said instruction the following occurred: [Tr. p. 119]:

> The Court:
>
> "Without indicating just how many ballots have been for one way and how many ballots the opposite way, that is to say, without indicating just how many

stand in any particular way, either for acquittal or otherwise, but merely giving the numbers voting one way as against the other way; for example, if in one case the vote stands 6 to 6, without indicating anything further, or if another case the vote stands 8 to 4, without indicating how many stand for acquittal and how many for conviction, may we ask you to indicate first of all, how many ballots have been taken in 11,752, which is the so-called conspiracy charge.

Foreman Person: Your Honor, the different number of ballots have been taken separately against the different defendants.

The Court: Well, then, coming now to the last balloting, will you indicate the numerical division, without indicating how many voted for acquittal and how many voted otherwise." [Rep. Tr. p. 1720, lines 1-13.]

The foreman stated that as to one defendant the ballot was 10 to 2 and in the case of another defendant it was 11 to 1, in case No. 11,752, which was the conspiracy case in which both appellants were being tried.

The court made inquiry as to case No. 11,755, and was told by the foreman that the numerical division was 11 to 1 as to each defendant; and the court made inquiries as to case No. 11,757 and ascertained from the foreman that the numerical division was 11 to 1 as to each defendant. Both of these latter cases were cases in which the appellant Curry was named as a defendant.

All of these proceedings were taken and had over the objection and exception of counsel for the appellants.

The next day the jury, at 11:55 a. m., returned verdicts of guilty against the appellants.

It is the contention of counsel for appellant Curry that this procedure of the court is directly in violation of the settled and established law pronounced by the Supreme Court of the United States, and that this court has no alternative but to reverse the judgments pronounced against him.

In the case of *Burton v. United States,* reported in 196 U. S. at page 283, the jury had retired on Saturday evening and came into court Monday morning without agreeing upon a verdict, and the court said in the trial court, addressing the foreman of the jury:

> "I gather from this letter, Mr. Foreman, what I may be incorrect about. I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction, or how many for acquittal, but to know the number who stand the one way and the number who stand another way. I would like the statement from the foreman.
>
> The foreman: Eleven to one."

In reversing that case the court said:

> "Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved.
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> * * * * * * * * *
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> "We must say in addition that a practice ought not to grow up of inquiry of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal,

but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain."

In a later case, and one which is, of course, familiar to this court, that of *Brasfield v. United States,* 272 U. S., at page 448, 71 Law. Ed. 345, in reversing that case, a case in which this circuit had affirmed the conviction, the Supreme Court said, in part:

"The only errors assigned which are pressed upon us concern proceedings had upon the recall of the jury after its retirement. The jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically, and was informed by the foreman that it stood nine to three without indicating which number favored a conviction.

* * * * * * * *

"We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature

> or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned."

Following the decisions in the *Brasfield* and *Burton* cases, this Circuit Court held in the case of *Jordan v. United States,* reported in 22 Fed. Rep. (2) at page 966, that a conviction should be reversed for a proceeding on the part of the trial court in this district which did not go as far as the proceedings here complained of, and the Court merely asked the jury not how they stood numerically but if they were about equally divided, after they had been deliberating for twenty-four hours, and it was there held that such a proceeding came within the inhibitions laid down by the Supreme Court.

It would seem to Appellant that further argument would be unnecessary and that a reversal of the judgments of conviction are required by the law.

It is respectfully submitted that said judgments be reversed.

Respectfully submitted,

AMES PETERSON,

Attorney for Appellant Curry.